1959

Bessie Auerbach, Madeline A. Werner and Selma A. Mohr v. Fannie F. A. Samuels et al : Reply Brief of Plaintiffs and Appellants

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

BESSIE AUERBACH, MADELINE A. WERNER, and SELMA A. MOHR,

Plaintiffs and Appellants,

—vs.—

FANNIE F. A. SAMUELS, L. R. SAMUELS, and FREDERICK FOX AUERBACH, and FANNIE F. A. SAMUELS, L. R. SAMUELS, FREDERICK FOX AUERBACH, and WALKER BANK & TRUST COMPANY, as Trustees of the Testamentary Trust created under the terms of the Last Will and Testament of FREDERICK S. AUERBACH, deceased,

Defendants and Respondents.

Case No. 9090

REPLY BRIEF OF PLAINTIFFS AND APPELLANTS

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A.

In an attempt to create a false atmosphere of candor and fairness on the part of Fannie, the respondents refer: to Fannie's statement in her petition to the Court of May 16, 1940 that she was "willing to abide by the construction of said will by this court, and the application thereto of the facts, which shall be found by the court." (Respondents br. p. 6)*; to the District Court's order of May 21,

*Page references are to respondents' brief, unless otherwise indicated.

1940, (entered on Fannie's petition) exonerating her from liability to the plaintiffs on account of the specific legacies (pp. 7-8); and to Fannie's statement in 1939 or 1940 that "there wasn't enough left for you girls to get each $10,000" as something which the Court "did in fact find." (p. 16)

The respondents, however, ignore the fact that the May 1940 proceeding was not an adversary proceeding at which plaintiffs were heard. There was no adverse party present at the hearing to point out to the Court that the calculations used by Fannie in her petition were improper and would unjustly deprive plaintiffs of their legacies.

Fannie's conduct, as was pointed out in plaintiffs' main brief, caused them to refrain from appearing at the May 1940 hearing, thus making it, in effect, an *ex parte* hearing. In this connection, the following statement of the Court in *In re Rice's Estate*, 11 Utah 428 (discussed at pp. 26-27 of Appellants' br.) in pertinent:

> ". . . There is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. . .
>
> Equity will relieve one seeking relief from the effect of a judgment or decree procured by the conduct of the successful party which prevents the injured party from appearing at the trial or hearing on the merits."

B.

Respondents state (p. 15): the plaintiffs' sole objection to the order of 1940 is that they believe the Court and Fannie were in error in making the computation in that they improperly deducted taxes; and that plaintiffs contend nothing more than an error by a court. This

statement is erroneous. Apparently, respondents have not read plaintiffs' brief very carefully. On page 30 of their brief, plaintiffs request relief, for example: "on the grounds of either *extrinsic fraud or mistake, or both.*"

C.

Respondents do not deny: that in 1939 or 1940 Fannie told the plaintiff, Madeline Werner, and her sister, Jennie Auerbach, deceased, that there was not enough in Frederick's estate for the "girls to get each $10,000"; nor that Herbert told Fannie that he had to explain to plaintiffs that they were not going to receive any inheritance from Frederick's estate, "because the net amount doesn't come up to the specified amount"; nor that Fannie's attorney told plaintiffs' attorney that the value of the estate "proved to be under $350,000."

Madeline Werner acted on behalf of her sisters, Bessie Auerbach and Selma Mohr, the other plaintiffs herein, and managed their affairs. (Apps.' Deps. p. 15, ln 8-29; p. 61, ln 13-21) And, the plaintiffs relied on Herbert, Fannie's confidant* to look after their interests in Salt Lake City. (Apps.' Deps. p. 10, ln 7-9; p. 61, ln 26-29; p. 105, ln 24-30; p. 106, ln 1-4)

Under all of the circumstances, the plaintiffs made no inquiry of anyone, with respect to their rights or interest in Frederick's estate, from the date of his death in 1938 until immediately prior to the commencement of this action in 1957. (Bessie Dep. p. 35, ln 18-29; Selma Dep.

*Respondents seem to object to plaintiffs' reference in their brief to Herbert as "Fannie's confidant" (br. p. 31). But, Fannie herself, testified upon her deposition that Herbert was her "confidant" (p. 11, ln 25; p. 21, ln 29), and further that Herbert was the one with whom she "discussed everything with, more so than with Jim [her lawyer]" (p. 58, ln 27-30; p. 59, ln 1-3. (Brackets added)

p. 86, ln 29-30; p. 87, ln 1-11, 27-28; Madeline Dep. p. 120, ln 24-30; p. 121, ln. 1-5; p. 133, ln 28-30; p. 134, ln 1-13) There was no need for plaintiffs to inquire of others concerning their interest in Frederick's estate. They had full confidence in Fannie and relied upon her to do the right thing.

In this connection, Selma testified upon her deposition, as follows (p. 87, ln 8-17):

> Q. You didn't make any inquiry of Herbert while he was alive?
>
> A. No.
>
> Q. You didn't make any inquiry of Fan or Les?
>
> A. No, never would make any inquiry of them.
>
> Q. Why not?
>
> A. I wouldn't.
>
> Q. Why not?
>
> A. Well, I just felt that *we had confidence in Fannie, that if anything was coming to us that she would eventually give it to us. . .*"

Bessie similarly testified (p. 40, ln 9-13):

> "Q. Going back to this, you make the statement or the charge that because of all these things you were misled. Now how were you misled?
>
> A. Well, I thought Fannie would do as Fred asked her naturally. Fred left the ten thousand; I thought she as his executrix would carry out his wishes."

And, Madeline testified (p. 155, ln 16-23):

> "Q. You knew in 1940 that you were to receive some money under the will, did you not?
>
> A. Just from what Herbert had said. I would never have asked Fannie. I considered she had been

brought up to do the right thing. I have known her since she was 12 years old, and I would think ultimately we would get it. . . ."

Mr. Otterbourg also testified (Otterbourg Dep.):

"Q. In any event, in June of 1946, you did know at that time that Frederick had left in his will bequests to the girls, isn't that correct?

A. Yes, I knew that.

Q. And you knew that these bequests were in the sum of $10,000 apiece?

A. Yes, I knew that.

Q. And you knew the general provisions as to the bequests, general terms of the bequests?

A. I knew in a general way if the estate was large enough, they'd get it; and if it was not, they would not." (p. 31)

Again, with respect to Mr. Ingebretsen's reply dated July 18, 1946, to his letter of July 12, 1946:

"Q. Were you satisfied with the answers that you received?

A. Surely; surely.

Q. Did you forward this information that you had in this letter to the girls?

A. I don't remember that I forwarded it, no. My recollection is that at some time or other, not then, because I'm sure they were not here in New York, but at some time or other, I may have mentioned it in passing, "It is too bad, but there isn't enough in your estate for a legacy." At some time, maybe. (pp. 50-1)

Again,

"Q. So, as far as you were concerned you just let the matter drop after receiving the letter from Ingebretsen?

A. As far as I was concerned, the situation was that Mr. Ingebretsen, who had been the family counsel and who had been in the confidence of all these people all these years and who had been Herbert's lawyer, wrote me these facts and *I saw no need to question it any further,* as far as I was concerned, or to advise him; so we did not discuss it. *I relied on his statement."* (pp. 53-4) (Emphasis added)

Again,

"Q. Did Mrs. Werner ever ask you as to whether you received an answer to your letter of July 12, 1946?

A. I think not, but I am not sure of that. *I know I must have told her, and that's my recollection,* but I would not know just when, at some point when they got back from their vacation or something, *"It wasn't more than* $350,000 *in the estate, that was too bad."* (p. 60) (Emphasis added)

Against the clear, undisputed and sworn testimony, first of plaintiffs that they had full faith and confidence in their sister-in-law, Fannie, and were relying on her to do the right thing, second, of plaintiffs' attorney that he relied without question on the written statement of Fannie's attorney that there was not enough in the estate to pay the legacies, third, of plaintiffs' attorney that he communicated this information to Mrs. Werner and, fourth, of Fannie herself that both she and Herbert informed plaintiffs there was not enough left for the girls to get each $10,000,—against all this—, can Fannie now be heard to argue plaintiffs were not lulled into inaction as a result of her misrepresentations? No other inference is possible on the facts but that the misrepresentations of value were in fact made to plaintiffs and were in fact relied upon by plaintiffs.

We recall again the decision of this court in the *Rice* case that an executor's petition misconstruing the amount of a legacy is *extrinsic fraud* (a fortiori where the executor stands to profit by the act). We also emphasize again under the doctrine of that case and the others cited by plaintiffs, that Fannie's admitted misrepresentations are not being "tortured into extrinsic fraud" as stated by respondents. Such misrepresentations caused plaintiffs to think they had no interest in the estate, lulled them into inaction and permitted Fannie to obtain plaintiffs' property. Such misrepresentations constitute and are *extrinsic fraud* under the applicable Utah authorities. They also clearly had the effect of delaying any suit by plaintiffs until discovery of the mistake in June, 1957.

D.

Respondents contend (pp. 37-38) that Frederick intended that the estate and inheritance taxes be deducted from the gross estate in computing the net value of his estate. They state (p. 37): that Frederick wished that a minimum sum of $350,000 be placed in trust for Fannie and her son to assure them of an annual income of $17,500; and argue, in substance, that if taxes were deducted from the value of the estate that Fannie and her son might not obtain this minimum protection.

However, at pages 16-17 of their brief, respondents take a contrary view. There the respondents assert that Frederick gave Herbert a right under the will to purchase for *one dollar* all of the Auerbach store stock (valued at $473,100.34 in Fannie's May 16, 1940 petition), and that if Herbert exercised this right, the value of the estate would have been depleted by over $300,000. Thus, based upon respondents' own analysis of the will (par. Fifth), it

is clear that Frederick never intended that a minimum sum of $350,000 be placed in trust for the benefit of Fannie and her son.

Moreover, Frederick left Fannie insurance in the sum of $121,485.10 and real property worth $12,775.50, thereby assuring her of a substantial "nest egg." We submit that respondents' above contention is erroneous and is, also, contrary to the direct holding of the Court in *In re Missett's Will,* 136 N.Y.S. 2d 923 (cited at p. 19 of pltffs' brief).

E.

Respondents object to the reference in plaintiffs' brief to the Federal Estate Tax Return which was produced by respondents' attorneys upon Fannie's deposition. Respondents claim it is not clear for what purpose plaintiffs refer to the tax return, that the tax return is irrelevant and immaterial, that any reference to the document is improper, that respondents expressly refused to stipulate the return was an accurate copy of the one actually filed for the estate, and finally that the return was not produced "subject to verification" as stated in plaintiffs' brief at page 9.

The Federal tax return was willingly produced by respondents' attorney, Mr. Colton, at the deposition to assist plaintiffs' attorneys in their examination of Fannie. It was secured by Mr. Colton from the estate's files in the possession of the attorneys for the estate. It was assumed by Mr. Colton to be a true copy of the return actually filed by Fannie for the estate. Although refusing to stipulate that the return could be admitted into evidence until verified further, Mr. Colton did stipulate at the deposition that it was his understanding the document was

a true and accurate copy of the estate tax return. Cross-examination of Fannie on the basis of the return as produced thus proceeded subject only to the right in respondents' attorneys to verify the complete accuracy of the return before its formal admission into evidence. This appears from the following colloquy of counsel in Fannie's deposition:

> "Mr. Rosen:* Can we concede for the record that the United States Estate Tax Return on the estate of Frederick Samuel Auerbach, signed by Mrs. Samuels as the executrix, shows a total gross estate for tax purposes of $620,857.98 and . . .
>
> Mr. Colton: **Now before you go any further, because I will have to identify the source of this and I hadn't gone to the original, I *assume this is a true copy of the one filed.* This was obtained by me from the firm of Ray, Rawlins, Henderson and Jones, and it was a part of their file that they gave me; that is, they gave me the pleadings and that. I assume it is an accurate copy but I don't know; I would rather not stipulate." (p. 79)

Again,

> "Mr. Colton: Yes, but my qualification knocks out the entire stipulation. *I will stipulate at this time that it is our understanding, it is a true and accurate copy of the estate tax return.*" (p. 80)

Again,

> "Mr. Colton: Now wait, I will not stipulate we can admit this in evidence until we *verify* it further. (p. 80)

Again,

> "Mr. Gilmour: Mr. Rosen, it might assist Mr. Colton in his problem to know that the tax computed

*Representing Plaintiffs.

**Representing Respondents.

on that return is the same dollars and cents figures as shown in the court file as having been paid to the Federal Government for estate taxes.

Mr. Rosen: will that help you, Mr. Colton?

Mr. Colton: It would be very interesting. *I have no reason to doubt it is an accurate copy, but* the source it came to me, *it should be verified* before we enter any stipulation about the document." (pp. 81-2) (Emphasis added)

From the foregoing, it is thus clear that the statement in plaintiffs' brief (p. 9) that a copy of the Federal tax return of the estate was produced by Mr. Colton upon Fannie's deposition (subject to verification) is quite accurate and that the statement in respondents' brief (p. 42) that the return was *not* introduced "subject to verification" is quite inaccurate.

We mention this for the reason that respondents attempt to distract the court and brush away the tax return as "irrevelant and immaterial." To the contrary the tax return was pertinent to the issues raised in the pleadings. Plaintiffs wished to show, in the first place, as alleged in the complaint, that the Federal estate tax of $89,018.19 deducted in full by Fannie in computing net value for the purpose of plaintiffs' legacies, in fact included a large portion of tax on the large *non-testamentary* assets of insurance and jointly held property (approximating $134,000.00). This, as alleged, was shown. Plaintiffs also wished to show the basic and inherent incongruity of Fannie showing a net estate one minute, of $557,950 to the Federal Government and then turning around and showing a net estate the next minute to the court of only $330,382, *both net values being determinable* (except for the non-testamentary assets) *on essentially the same basis of computation as of the same date*, namely, date of death.

The tax return, of course, would have no pertinence on values at time of distribution but the question of values at time of distribution is not here in issue.*

*Fannie and her husband, as co-trustees, took over the residue of the estate at a value of $453,979.96 at the time of distribution as shown on pages 13-14 of plaintiffs' brief.

F.

Respondents contend (pp. 13-14) that the reference by plaintiffs to the memorandum opinion of the trial court is improper and should be disregarded. However, their authorities do not support this contention.

Grand Central M. Co. v. Mammoth M. Co., 29 Utah 49, 83 Pac. 648 is entirely different from the facts herein involved. There the Court refused to permit appellants to establish error on the basis of the lower Court's opinion, written before judgment. However, it did not preclude counsel from citing the opinion on the appeal, saying (p. 684):

> ". . . Nor is his act in delivering such an opinion one upon which error can be predicated, *although counsel may cite the document in argument.*" (Emphasis added)

Plaintiffs' right to refer to the memorandum opinion in their brief is further supported by another of the cases cited by respondents, namely, *Terry v. Terry*, 70 Idaho 161, 213 P.2d 906. There the Court said (p. 910):

> " . . .This Court has considered it not *improper* in order to call attention to the theory adopted by the trial court to refer to the memorandum decision." (Emphasis added)

The plaintiffs, here, have cited the memorandum opinion to indicate the basis of the trial Court's judgment. Thus, even under the *Grand Central* and *Terry* cases,

supra, cited by respondents, plaintiffs' reference was perfectly proper.

Nor does *Victor M. Co. v. National Bank,* 18 Utah 87, 55 Pac. 72 support the proposition for which it is cited by respondents. It held merely that the lower Court's opinion could not be regarded as a "finding of facts." Actually, the Court, in referring to the opinion, stated that it (p. 73):

> " . . . may be of great importance on account of the information which it imparts respecting the legal principles which govern the court and should guide the litigants. . . "

Respondents rely heavily on *L. Romano Engineering Corp. v. State,* 8 Wash. 2d 670, 113 P.2d 549 (1941) for the proposition that any *subsequent* statement by the lower Court should have no effect on the judgment. Again, the facts in that case bear no resemblance to those before this Court. There the memorandum opinion was written (p. 553):

> "After the record in the case was complete, the judgment made and filed, notice of appeal given, and the statement of facts certified."

Here the memorandum opinion was written on June 5, 1959, only a few days after judgment was entered (May 28, 1959), and long before the notice of appeal and designation of the record on appeal were filed.

Additionally, the Court, in the *Romano* case, found the opinion to be nothing more than a "colloquy between court and counsel". In the instant case the memorandum opinion is not the result of mere "colloquy." It is a

determination made by the Court upon all of the evidence previously presented to it by both parties on the hearing held on May 7, 1959.

Furthermore, the plaintiffs are not citing the memorandum opinion to qualify or limit the judgment but, as we have indicated, to call the attention of this Court to the basis of the lower Court's judgment. We submit that this is entirely proper and in accord with the authorities, including those cited by respondents.

The other authorities cited by the respondents, for similar reasons, have no application.

G.

Respondents seek to avoid the principles laid down by the authorities cited by plaintiffs at pages 25-29 of their brief by contending that the facts are entirely different from the case at bar (pp. 19-23). Contrary to respondents' contention, we submit, that a study of the facts in these authorities will reveal a striking resemblance to those present here.

Further, respondents assert (p. 20) that since Fannie petitioned the Court for an interpretation of the will, her conduct was in accord with a statement made by the Court in *Rice v. Rice,* 117 Utah 27. Respondents' assertion, however, is misleading. They attempt to support their position by relying upon a statement in the opinion taken entirely out of context. It is clear from the opinion that the Court had in mind an "interpretation of the will" based upon an *adversary proceeding* and not a proceeding such as the May 1940 proceeding involved herein.

We submit that the authorities cited in plaintiffs' brief are applicable and fully support plaintiffs' position herein.

H.

The cases cited by respondents (pp. 25-36) for the proposition that plaintiffs are barred by the statute of limitations and laches are not in point. Those cases do not involve *extrinsic fraud*, or *mistake*, or *both*, such as is here present. They are not applicable.

CONCLUSION

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT GRANTED.

Respectfully submitted,

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